Supreme Court, U.S.
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No. 90-300

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICKY ALLEN HAYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's conviction for conspiracy to possess cocaine and marijuana with intent to distribute them.

2. Whether the district court failed to give adequate consideration to petitioner's asserted inability to pay a fine when it imposed a fine of $500,000 plus the costs of petitioner's incarceration and supervised release.

3. Whether the sentencing court erred by departing downward from the range prescribed by the Sentencing Guidelines on the basis of the small quantity of drugs seized and the apparent absence of violence involved in petitioner's offenses.

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OPINION BELOW

The court of appeals' opinion (Pet. App. 1a-12a) is reported at 899 F.2d 515.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1990. A petition for rehearing was denied on May 16, 1990 (Pet. App. 13a). The petition for a writ of certiorari was filed on August 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the Western District of Kentucky, petitioner was convicted of conspiracy to possess cocaine and marijuana with intent to distribute them, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a). He was sentenced to 240 months' imprisonment, to be followed by a five-year term of supervised release. He was also fined $500,000 plus the costs of incarceration and supervised release. C.A. App. 12-13. The court of appeals upheld the conviction and the fine, but remanded for resentencing to a term of imprisonment within the range prescribed by the Sentencing Guidelines (360 months to life).

1. In May 1988, undercover Louisville police officer Gary Epperson was investigating Steve Gordon, a suspected drug dealer. On two different dates, Gordon sold cocaine to a police informant while Epperson watched. Both times, petitioner drove Gordon to the site of the sale, dropped him off, and waited for him at a nearby gas station. The informant told police that the driver of the car was the supplier of the cocaine. After one of the sales, petitioner and Gordon drove together to petitioner's apartment. Pet. App. 2a.

The police obtained a warrant to search petitioner's apartment and his car. When the police arrested petitioner and Gordon as they left the apartment, the police found in petitioner's pocket a small set of scales of the kind used to weigh drugs. Inside petitioner's apartment, the police found seven pounds of marijuana, a triple beam scale, a smaller set of scales, drug paraphernalia, detailed records of drug transactions, and $12,789 in cash. Pet. App. 2a.

The marijuana was found in plastic bags; some was loose, but some consisted of compressed chunks, as though it had been part of a bale or brick of the type used to transport marijuana. Pet. App. 2a; C.A. App. 76-86. Epperson testified that marijuana in compressed form is typically handled by persons high in the chain of distribution and is broken down for further distribution. C.A. App. 86. Some of the marijuana was in bags in quantities exceeding the amount that would be sold for personal use. *Id.* at 84-85. Although the police found no cocaine in the apartment, they did find paraphernalia associated with the cocaine trade, including two milk jugs filled with the corners of plastic sandwich bags, which are used to package cocaine for retail sale. Pet. App. 2a; C.A. App. 74.

At trial, Epperson was qualified as an expert and testified regarding the information in the records found in petitioner's apartment. The records reflected drug trafficking on a large scale. For numerous individuals identified by abbreviations or codes, the records showed running tabs of amounts due, increased by "fronts" (consignments of drugs on credit) and reduced by payments. See C.A. App. 91-108. The accounts for each individual showed transactions involving hundreds and, in some cases, thousands of dollars. See C.A. Supp. App. 34-35, 37, 39-42. Based upon those records and the quantities of drugs reflected in other records, Epperson testified that petitioner was dealing with people who were redistributing cocaine and marijuana after they purchased it from him. C.A. App. 126-128.

Other records included frequent notations consisting of the number eight enclosed inside a circle—a symbol for an "eightball," the street term for an eighth of an ounce of cocaine; the records indicated

numerous transactions involving more than one eightball. C.A. App. 122-126. See, *e.g.*, C.A. Supp. App. 25. Epperson testified that transactions involving multiple eightballs would be for resale. C.A. App. 126. Based upon the records, Epperson calculated that petitioner was selling $7000 to $12,000 in cocaine and marijuana each day. *Id.* at 115; Pet. App. 3a, 5a.

2. Because petitioner had two prior convictions for drug trafficking, he was classified as a career offender under Section 4B1.1 of the Sentencing Guidelines. The applicable Guideline range for petitioner's conspiracy offense—which reflected the quantity of the drugs involved and petitioner's criminal history—was 360 months to life imprisonment.[1] Over the government's objection, the district court departed downward from that range, and sentenced petitioner to 240 months' imprisonment on the conspiracy count. As the basis for its departure from the Guideline sentencing range, the district court found (C.A. App. 13):

> [Petitioner's] involvement in the drug trafficking business is not disputed. However, in comparison to other career offenders involved in the drug trafficking industry, [petitioner] does

[1] The evidence at the sentencing hearing showed that petitioner's conspiracy offense involved at least 250 pounds of marijuana and four pounds of cocaine. C.A. App. 142, 150. Under 21 U.S.C. 841(b)(1)(B), the maximum penalty for a conspiracy involving this quantity of drugs is life imprisonment. Consequently, Sentencing Guidelines § 4B1.1 mandated that petitioner be assigned an offense level of 37. Petitioner's criminal history score placed him in Category VI. The applicable sentencing range for this combination is 360 months to life imprisonment. Sentencing Guidelines § 5A Table. See Gov't C.A. Br. 3; Pet. App. 12a.

> not appear to have been involved with the large quantities of drugs that are routinely found in such cases. Likewise, the physical violence or threat of violence that often accompanies drug dealers was not evident in this case or anywhere in the defendant's history. The Court has before it, an unusual case with both aggravating and mitigating circumstances which could not adequately have been taken into consideration by the Sentencing Commission in formulating the guidelines. Under the provisions of Section 5K2.0, the guideline level for the offenses of conviction under the career offender provisions is considered inappropriate and excessive in view of these unusual circumstances.

On the other count, which charged possession of marijuana with intent to distribute it, petitioner was sentenced to a concurrent term of 120 months' imprisonment. That term was within the applicable Guideline range.

The district court also fined petitioner $500,000 plus the costs of his incarceration and supervised release. Under Sentencing Guidelines § 5E1.2(c)(4), petitioner was subject to a maximum fine of $4,000,000 on the conspiracy count and $500,000 on the substantive count. The court rejected petitioner's contention that he lacked the resources to pay a substantial fine. It determined that "in view of [petitioner's] financial profile, he *may* have the ability to pay a fine, the costs of imprisonment and the costs of supervision." C.A. App. 13. At the sentencing hearing, the district court noted that petitioner had conducted his highly profitable drug business in cash. *Id.* at 154. While the court acknowledged that it did not know where petitioner's funds were located, it found that "somewhere someplace in some lockbox or

in some other hidden place he has got some money stashed away." *Ibid.*

3. The court of appeals affirmed petitioner's convictions, rejecting his contention that there was insufficient evidence to sustain the conspiracy count. Pet. App. 4a-5a. The court noted that petitioner had twice accompanied Gordon when Gordon sold cocaine to a police informant; that the search of petitioner's apartment revealed marijuana that had been shipped in bulk, large sums of cash, and equipment used to prepare cocaine for distribution; and that the records found in petitioner's apartment revealed "a busy and lucrative trade with dozens of buyers, netting as much as $12,000 a day." *Ibid.* The court added that the government's evidence in this case was far more comprehensive than in other cases in which courts had been asked to infer the existence of drug conspiracies from "nothing more than scraps of paper which the government called records." *Id.* at 5a.

The court of appeals also upheld the fine imposed on petitioner. The court noted that Sentencing Guidelines § 5E1.2(d)(2) requires a court to consider a defendant's ability to pay a fine "in light of his earning capacity and financial resources," and allows consideration of the defendant's undisclosed income or assets. Pet. App. 6a. Relying upon the amounts of cash seized from petitioner's apartment and referred to in his records, the court of appeals upheld, as not clearly erroneous, the district court's finding that petitioner had the resources to pay a substantial fine. *Ibid.*

The court of appeals vacated the term of imprisonment imposed on the conspiracy count, holding that the factors on which the district court had relied in departing from the applicable Guideline range—the

quantity of drugs and level of violence involved in petitioner's latest offense—did not justify a downward departure. Pet. App. 7a-9a. The court concluded that because the Sentencing Commission had taken account of those factors in promulgating the Guidelines, those factors could not serve as the basis for a departure from the prescribed sentencing range. The court contrasted the Guidelines applicable to drug felons other than career offenders, which "are finely calibrated to the amount and type of drugs involved," with those applicable to career offenders, which provide automatically for a high offense level "based on the propensities they have demonstrated over time rather than on the particulars of their latest offense." *Id.* at 9a. On that basis, the court concluded that the Sentencing Commission had considered the significance of the quantity of drugs involved in an offense in formulating the Guidelines applicable to career offenders. Accordingly, the court held, the quantity of drugs involved was "ruled out as a mitigating factor" that could warrant a departure from the applicable sentencing range. *Ibid.*

The court also noted that the use of violence in the commission of an offense was a basis for an addition of points going to the offense level; thus it reasoned, "the absence of violence is implicitly considered to the extent that the punishment is not increased by giving additional sentencing points." Pet. App. 9a-10a. "Because the lack of violence has been adequately considered in the guidelines," the court concluded, "it could not serve as a cause for departure from the guidelines." *Id.* at 10a.

In a concurring opinion, Judge Merritt advanced a somewhat different rationale for vacating the term of imprisonment imposed on the conspiracy count. In his view, an appellate court is ordinarily justified

in reviewing a departure from the Guidelines—and the question whether the Sentencing Commission took account of the factors underlying the departure —only under an abuse of discretion standard. However, Judge Merritt noted that 28 U.S.C. 994(h) requires that "the Guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for third-time offenders such as petitioner. Pet. App. 12a. Because the maximum term authorized for petitioner's conspiracy offense was life imprisonment, Judge Merritt concluded that the 240-month term imposed by the district court did not comply with the statutory directive that the sentence imposed be "at or near the maximum" for that offense. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 3-7) that there was insufficient evidence of his participation in a conspiracy to distribute drugs; he suggests that the records found in his apartment were inadequate to show a conspiracy and that the evidence was consistent with his having participated only in sales to customers for personal use.

As the court of appeals determined, the evidence amply justified the jury's finding that petitioner was a major participant in an ongoing drug distribution conspiracy. The jury was entitled to conclude that the records found in petitioner's apartment reflected petitioner's drug trafficking, and those records demonstrated far more than occasional sales to customers for personal use. The records included running accounts for numerous individuals. The accounts involved large sums of money and showed repeated entries for "fronts" and payments that were indica-

tive of sales of drugs for resale. The records also showed sales of "eightballs" in quantities that, in the opinion of an experienced police officer, were characteristic of sales for further distribution.

There was substantial evidence apart from the records that petitioner was a member of a large-scale conspiracy. Some of the marijuana seized from his apartment was in compressed form, apparently taken from the bales or bricks in which marijuana is ordinarily shipped. Epperson testified that marijuana in this form is typically handled by persons high in the chain of distribution and is broken down for further distribution. Some of the marijuana was in bags in quantities exceeding the amount that would be sold for personal use. The police seized more than $12,000 in cash, along with materials used to package cocaine for retail sale. Finally, the evidence demonstrated that petitioner participated in Gordon's sales of cocaine to a police informant.[2]

In view of the abundant evidence that petitioner engaged in large-scale drug trafficking, the jury was fully justified in inferring that petitioner was not operating alone, but instead distributed drugs in concert with a number of co-conspirators.

The evidence of petitioner's participation in a conspiracy was far more compelling than the evidence of guilt in *United States* v. *Cepeda*, 768 F.2d 1515

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[2] Petitioner contends that he was not charged with conspiring with Gordon. Pet. 6. The indictment, however, charged that petitioner conspired with "divers other persons, known and unknown to the Grand Jury, *including but not limited to*" those named (by the abbreviations appearing in petitioner's records) in the indictment. C.A. App. 8 (emphasis added). Nothing in the indictment ruled out Gordon as a co-conspirator.

(2d Cir. 1985), or *United States* v. *Hernandez-Palacios*, 838 F.2d 1346 (5th Cir. 1988), the two cases on which petitioner relies. See Pet. 6. In *Cepeda*, there was no evidence that the defendant had participated in even a single sale of drugs; moreover, the court of appeals found that the drug paraphernalia and small amounts of cutting agents found in the defendant's apartment were not sufficient to justify a conclusion beyond a reasonable doubt that the defendant was engaged in a drug-distribution conspiracy. 768 F.2d at 1517. In *Hernandez-Palacios*, the defendant was arrested while driving a bus in which marijuana was hidden; there was apparently no evidence that others had been involved in the shipment. See 838 F.2d at 1347-1349. The facts in petitioner's case provide ample evidence of concerted action of the sort found wanting in *Hernandez-Palacios*.

2. Petitioner next argues (Pet. 7-8) that the district court gave insufficient consideration to his asserted inability to pay a $500,000 fine.

Section 5E1.2(d)(2) of the Sentencing Guidelines requires a district court to consider the defendant's ability to pay a fine "in light of his earning capacity and financial resources." As the court of appeals noted, however, the Guidelines also make clear that the court may consider undisclosed income or assets of the defendant. In this case, the records seized from petitioner's apartment reflected drug-trafficking activity in amounts of up to $12,000 a day. Pet. App. 3a. More than $12,000 in cash was seized from the apartment, and the seized records included a reference to some $96,000 stored in a box. *Id.* at 2a-3a. Although petitioner was arrested at a time when his drug business was apparently flourishing, he claimed at sentencing that his only asset was a half-interest

in a rundown house. C.A. App. 151. In light of the evidence of petitioner's substantial drug distribution business, the district court was fully justified in rejecting petitioner's implausible assertions concerning his financial condition. The Sentencing Guidelines require consideration of defendant's ability to pay a fine, and the district court addressed that issue in this case. The Guidelines do not, however, require a court to identify specific assets from which the fine can be paid.

3. Finally, petitioner challenges (Pet. 9-13) the court of appeals' determination that the district court was not entitled to depart from the applicable sentencing range on the basis of the quantity of drugs and level of violence involved in the conspiracy offense.

The Sentencing Reform Act limits a district court's discretion to depart from the sentencing range prescribed by the Sentencing Guidelines. The court must impose a sentence within the applicable range unless it finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b). The findings upon which the district court relied in this case do not satisfy that standard.

Under the Sentencing Reform Act, the Guidelines applicable to persons over 18 years of age who have committed three felonies involving violence or violations of specified drug statutes must "specify a sentence to a term of imprisonment at or near the maximum term" authorized for the latest offense. 28 U.S.C. 994(h). In accordance with this mandate, the Sentencing Commission has tied the offense levels

for crimes committed by such career offenders to the maximum terms authorized for those crimes. Sentencing Guidelines § 4B1.1. Except to the extent that the quantity of drugs is material to the determination of the maximum penalty for an offense, it does not enter into the calculation of the offense level. In this respect, the Guidelines applicable to career criminals differ from those applicable to other drug offenders. See Sentencing Guidelines § 2D1.1 (tying the applicable offense levels to the quantities of drugs involved in the pertinent offenses).

In the context of those provisions, the sentencing range for petitioner's offense was the product of (1) Congress's judgment, reflected in 21 U.S.C. 841(b)(1)(B), that the quantity of drugs in which petitioner dealt should expose him to a maximum sentence of imprisonment for life; (2) the mandate of the Sentencing Reform Act that career offenders violating Section 841 should receive a sentence near the maximum term; and (3) the Sentencing Guideline that implemented those statutory directives. Within that framework, the quantity of drugs involved in petitioner's offense could not justify a departure from the Guideline sentencing range. The Guidelines reflect a calculated decision, mandated by statute, that offense levels for crimes committed by career offenders will be tied to the maximums prescribed by Congress for the defendants' latest offenses (which, in the case of drug offenses, reflect the quantities of drugs involved). A court's determination that the quantity of drugs involved in a particular offense is relatively small cannot, therefore, be a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."

18 U.S.C. 3553(b). A district court sentencing a career offender may tailor a sentence to the quantity of drugs involved in an offense only in choosing a term of imprisonment within the applicable range.

The same reasoning forecloses a downward departure based upon a finding that petitioner's conspiracy offense did not involve violence. Congress has mandated a sentence for career offenders at or near the maximum for their latest offenses, regardless of the amount of violence involved.[3] The Sentencing Commission has complied with that direction in fashioning the Guidelines, and a sentencing court cannot properly determine—when a career offender is involved—that the level of violence in an offense is a mitigating circumstance that the Commission has failed adequately to take into account.

There is no conflict between the court's disposition of this issue and the decision of any other court of appeals. In *United States* v. *Brown*, 903 F.2d 540 (8th Cir. 1990), the court held that a district court has limited discretion to consider whether unusual features of a defendant's criminal record might justify a departure from the applicable sentencing range.[4] The court's reasoning does not support the

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[3] Once again, the Guidelines for non-career offenders provide for specific enhancement when the defendant's drug activity involves possession of a dangerous weapon. Sentencing Guidelines § 2D1.1(b)(1).

[4] In our view, *Brown* was wrongly decided. The Guidelines provision applicable to career criminals, § 4B.1, states that "[a] career offender's criminal history category in every case shall be category VI." In our view, this unequivocal directive supersedes the policy statement on which the *Brown* court relied—which is located in the Guidelines Section dealing with offenders generally—with respect to career offenders. This case does not present that question, since the district court did not purport to rely on that policy statement.

kind of departure involved in this case. In *Brown*, the court relied on a "policy statement," Sentencing Guidelines § 4A1.3, which expressly permits a court to consider whether the nature of a particular defendant's past offenses justifies treating him as though he were in a different criminal history category. By explicitly authorizing that consideration, the Sentencing Commission has made clear that an unusual criminal record is a circumstance that the Guidelines have not adequately addressed. In this case, by contrast, the district court based its departure from the applicable range on the features of petitioner's instant offense; the statutes and Guidelines discussed above embody a considered decision about how to treat that aspect of the sentencing determination. Further, the departures that can result from the application of the policy statement on which the *Brown* court relied are limited, and the court did not suggest that it would uphold a departure, such as the one in this case, that effectively undercuts the statutory directive that career offenders are to receive a sentence at or near the maximum for their latest offense.[5]

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[5] All of the examples cited in the policy statement involve a one-step reduction in the defendant's criminal history category. Here, petitioner's criminal history score placed him in Category VI. The district court did not suggest that this category overstated the seriousness of petitioner's past offenses. But even if the court had determined that petitioner's record was comparable to those customarily placing a defendant in Category V, the applicable range would still have been 324-405 months, far greater than the 240-month sentence the district court initially imposed. (As we have noted, Sentencing Guideline 4B1.1 expressly states that all career offenders are to be assigned to criminal history Category VI; in our view, that directive forecloses the application of the policy statement at issue in *Brown* to such offenders.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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